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ENGLAND'S ALARM!

ON THE PREVAILING
DOCTRINE OF LIBELS,
AS LAID DOWN BY THE
EARL OF MANSFIELD.

*'Twill be recorded for a precedent;
And many an error, by the same example,
Will rush into the state:—IT CANNOT BE.* SHAKS.

IN A LETTER TO HIS LORDSHIP,
BY A COUNTRY GENTLEMAN.

TO WHICH IS ADDED
BY WAY OF APPENDIX,
THE CELEBRATED
DIALOGUE BETWEEN A GENTLEMAN AND A FARMER,
WRITTEN BY SIR WILLIAM JONES,
WITH REMARKS THEREON, AND ON THE CASE OF THE
DEAN OF ST. ASAPH.

By M. DAWES, Esq.

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SCOTLAND'S ALARM

BY THE REV. JAMES

DOCTRINE OF LIBERTY

AND

EARL OF MARSHALL

THE

OF THE

IN A LETTER TO HIS LORDSHIP

BY A COUNTRY GENTLEMAN

TO WHICH IS ADDED

BY WAY OF



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OF THE

WITH REFERENCE TO THE

OF ST. ANDREW

H. M. D. W. S. N. 6

LONDON

PRINTED FOR

OPPOSITE THE

WESTMINSTER

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TO THE
RIGHT HONOURABLE

EARL MANSFIELD.

MY LORD,

AN arbitrary Judge is more pernicious to the constitution of this country, than an arbitrary Sovereign. For our laws may be undermined, but can never be openly overturned. Almost every tyrant, that sat on the English throne has fallen by that very constitution he laboured to destroy. And it would greatly conduce to the preservation of our liberties, were the people as jealous of the proceedings of their Judges, as of the prerogatives of their Princes. It is not the throne alone, but the woolpack that we must watch. Our Monarchs direct the limbs, our Parliaments the

B 2

head,

head, but our Judges are entrusted with the heart itself of the Constitution, the Law. If a Judge, therefore, breathe poison, it corrupts the life's blood of the state, and mortifies the whole sacred system.

How narrowly, then, ought Britons to scrutinize the conduct of their Judges. For they are but frail mortals, as the rest of mankind. When elevated and intoxicated with their juridical paraphernalia, they more often look forward to acquire wealth and power, than to preserve the rights of the people.

The legal power, my Lord, of an English Judge, is like that of an English King, very properly circumscribed. Tyrannic minds have always endeavoured to extend both. There is a propensity in mankind towards dominion, which, if not checked by jarring interests, would have, long ere this period, terminated in universal slavery and barbarity. When I see a Judge, therefore, supporting destructive precedents, in violation of the laws, in opposition to the genius of the Constitution, I cannot but think he is attempting

attempting to restore the state to its first principles of polity, when will was law, when force was equity, when slavery was freedom, and when rudeness was refinement.

Your Lordship has always shewn a fondness for curbing the power of juries in the case of a libel; and, imitating the conduct of some former Princes towards their Parliaments, you do not expound and advise, but command and overawe. When I have often beheld the dictatorial manner in which a Judge has treated juries, it reminded me of the first James, of pious memory, who used to tell his Parliaments they had no right to think, but to supply, and do as he directed. When that Monarch could not account for his right to reign arbitrarily by any record on earth, he piously pretended he had it from heaven.

Britain has as much danger to apprehend from judicial precedents, as from her Parliaments or her Princes: Perhaps more. A bad precedent once established, is even worse than a bad law. The latter

latter may be repealed, while the former ought to be erased. However the worthy may avoid following such precedents, they will ever be adopted by the unworthy, who will enlarge and refine upon them, by bringing every possible case within their meaning: For evil-minded Judges, my Lord, are as eager to fix precedents that shall sap the foundation of our liberty, as good ones are in correcting the erroneous practice of our Courts.

Early prejudices and arbitrary principles instilled into a youthful bosom, are very difficult to be eradicated. It is hardly in the power of education, travel, society, or even time, to expel that which is engendered in our very natures. Especially if that propensity flatters our pride, feeds our ambition, and raises our imagination to account even our blood as superior, and of a different quality from that of the common mass of mankind.

Those ideas may be laudable in a soldier, but are odious in a Judge. He cannot entertain too humble an opinion of his origin, to do justice to all, and undervalue none but those

those that encroach upon the rights and liberties of his fellow-subjects. For no man is proper to sit as an English Judge, my Lord, who does not value the rights and liberties of the meanest as intrinsically equal to that of the noblest. An upright Judge will never resemble a jockey, in estimating mankind, as horses, only by their blood. For it is one of the great marks of the goodness of Providence, not to permit rank, family, or fortune, to monopolize human talents. We often observe Lords with the narrow minds of plebeians, and plebeians possessed of virtues and genius that would throw a lustre on Princes.—Judges, therefore, in order to be just, must entertain an equal respect for the rights of all ranks of men; and the lowest peasant, even by birth, is entitled as much to the enjoyment of the laws, as the highest Peer.

These preliminaries being granted, my Lord, let us now come to the point in dispute. Ever since you ascended the bench, your Lordship has taken every opportunity

nity in the case of libels, to limit the power of juries. Whether you have constantly attempted to conquer them by your eloquence, or command them by your austere mandatory opinions; acting more often as a Counsellor than as a Judge, Jurors, my Lord, being but plain men, need only to be directed, not to be driven, or bewildered in the labyrinth of law. They have generally a just sense of right and wrong; and the function of Judge was instituted to be their guide, not their governor. Your Lordship's office is somewhat similar to a Judge Advocate in military trials, and, like him, you ought to pay a proper respect to your jurors. For you are no more in fact, than a chief and perpetual president of every jury, always keeping strictly to the *spirit* where you cannot to the *letter* of the law, which it is your duty to explain. The Judge only should declare, and the jurors decide.

As the slavish doctrine, that jurors are *only* judges of the *fact*, is big with the utmost danger to the freedom of the whole
British

British empire, it cannot be too generally execrated and exploded. The uncontrouled trial by jury being the cornerstone of the temple of Liberty, every one is personally interested in its preservation. It must therefore be strenuously supported, my Lord, on the most enlarged and sound basis, in opposition to all sappings and underminings. But it needs only to be minutely examined, and properly valued, to rouse the nation to preserve it unimpaired, for the benefit of the present generation, and that we may transmit it to posterity uncontaminated and undiminished.

The trial by jury, your Lordship knows, is so antient a privilege belonging to mankind, that its origin cannot properly be traced. Neither is it the business of this letter. It is only requisite, in order to alarm the people to recapitulate the blessings derived from this mode of trial, which gives jurors a right to decide upon the *law* as well as the *fact*, to point to the danger of its being destroyed, and to the fatal consequences of that destruction.

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Monarchs,

Monarchs, my Lord, have hitherto generally treated their subjects as if they were only their slaves. They have deemed them as private property, like their goods and chattels. For how few were the Princes that ever properly valued the lives and the liberties of their people? Elected by their fellow-creatures as their chief magistrates, to guard their persons and property, they have often been the first to destroy that which they were called to protect.— Civil wars were the result of such conduct. The people were compelled, in defence of their freedom, to attempt to resume that power which they had delegated to one of their number for their mutual protection. If they failed, they were enslaved. But if they prevailed, they either sacrificed the tyrant, and expelled his race, or assumed a share in the government themselves, to be a check on the Monarch, and reduce his power within the limits of certain laws of their own framing.

Thus were the Grecian and Roman Senates, the Jewish Sanhedrims, the German Diets,

Diets, the French and English Parliaments, &c. first created. These institutions may be termed the *truly Grand Juries* of the *human race*. While they preserved their privileges, the people preserved their liberty. They investigated and regulated every momentous transaction with the utmost acuteness, ability, liberality, and patriotism. And the verdicts they gave were commonly the most proper, equitable, and unbiassed.

The British Parliament, my Lord, is the only remaining vestige in the world of those *national juries*, that now stands upon a stable and unweakened foundation. The jurors it contains are chosen by the people, to sit, hear, and redress every grievance, by their special and general verdict, which they deliver to the Sovereign Judge, for his final declaration. But does he ever question their right to deliver a general verdict in all cases whatsoever? The Sovereign on the throne is in many respects similar to the Judge on the bench. It is his business to declare the law, and he *must* leave *his* jurors

to their free opinions. The only material difference between a Sovereign and a Judge is, that the one enforces the law, and the other explains it. But neither has any legal authority to deprive the people of their dearest rights. For the nation ought on no account to rely on the capricious, partial, or inscrutable *arbitrium* of any individual whatsoever.

Whether the trial by jury arose from the popular assemblies, or the assemblies from that mode of trial, is, my Lord, I believe not ascertained. Certain it is, that we can trace the trial by jury up to the Athenians. Every free citizen of Athens was a juror, if he pleased, for he had a right to sit as a Judge. Citizens, there, must have even sat at the Areopagus as jurors or judges, which terms are undoubtedly synonymous. For although it is said that Solon instituted only nine Archons as members of that Court, yet it is recorded that on the condemnation of Socrates, there were no less than a majority of 361 against him in the Areopagus. From this great majority we may imagine,
that

that those nine Archons were the Judges skilled in the laws, and explained it to their numerous fellow-citizens, who were convened to decide upon the law and the fact. This is a proof of the antiquity of juries. Now for the utility.

To establish this, my Lord, beyond doubt or cavil, let us hear what your late worthy and learned brother (Sir William Blackstone) mentions on this great and consequential point. I do not quote this sound and skilled Lawyer for your information or satisfaction, but for that of the public. Treating of the utility of Juries, Sir William says, "The trial by jury, called also *per pais*, or *by the country*, hath been used time out of mind in this nation, and seems to be coeval with the first civil government thereof. Some authors have endeavoured to trace the original of juries up as high as the Britons themselves, the first inhabitants of our island. But certain it is, that they were in use among the earliest Saxon colonies, their institution being ascribed by Bishop Nicholson, to Woden himself, their legislator and captain.

captain. Hence it is, that we may find traces of juries in the laws of all those nations which adopted the feudal system, as in Germany, France, and Italy, who had all of them a tribunal composed of twelve good men, and true, "*boni homines*," usually the vassals or tenants of the Lord, being the equals or peers of the parties litigant; and as the Lord's vassals judged each other in the Lord's courts; so the King's vassals, or the Lords themselves, judged each other in the King's court. In England we find mention of them so early as the laws of King Ethelred, and that not as a new invention. This tribunal was universally established of old among all the northern nations; and so interwoven in their very constitution, that the earliest accounts of the one, give us also some traces of the other. Its establishment, however, and use in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by *battel*, was always so highly esteemed and valued by the people, that no conquest, no change of government could ever prevail to abolish it. In *Magna*
Caata,

Carta, it is more than once insisted on as the principal bulwark of British liberties; but especially by chap. 29, "That no freeman shall be hurt in either his person or property, *nisi per legale judicium parium suorum vel per legem terræ*;" a privilege which is couched in almost the same words with that of the Emperor Conrad, two hundred years before: "*Nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum et per judicium parium suum.*" And it was ever esteemed in all countries a privilege of the highest and most beneficial nature. The more it is searched into and understood, the more it is sure to be valued: And this is a species of knowledge most absolutely necessary for every gentleman in the kingdom; as well because he may be frequently called upon to determine in this capacity the rights of *others*, his fellow-subjects, as *because his own PROPERTY, his LIBERTY, and his LIFE, depend upon MAINTAINING, in its LEGAL FORCE, the CONSTITUTIONAL trial by jury.*" Again, "The trial by jury has ever been, and I trust ever will be looked upon as the glory of the English

English law. As it has so great an advantage in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases ! It is the most transcendent privilege which any subject can enjoy or wish for, that he cannot be *affected* either in *his property, his liberty, or his person*, but by the *unanimous consent* of *twelve* of his *neighbours and equals*. A Constitution *that I may venture to affirm has, under Providence, secured the just liberties of this nation for a long succession of ages ; and therefore a celebrated French writer, who concludes, " that because Rome, Sparta, and Carthage have lost their liberties, therefore those in England in time must perish," should have recollected, that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury."*

" It is a circumstance well worth an Englishman's observation, that in Sweden the trial by jury, that bulwark of northern liberty, which continued in its full vigour so lately as the middle of the last century,

is now fallen into disuse; and that there, though the regal power is in no country so closely limited*, yet the liberties of the Commons are extinguished, and the Government is degenerated into a mere Aristocracy. It is, therefore, upon the whole, a duty which every man owes to his country, his friends, his posterity, and himself, to maintain, to the utmost of his power, this valuable Constitution in all its rights; to restore it to its ancient dignity, if at all impaired by the different value of property, or otherwise deviated from its first institution; to *amend* it, wherever it is *defective*; and above all, to GUARD with the most JEALOUS CIRCUMSPECTION against the INTRODUCTION of NEW and ARBITRARY METHODS of TRIAL, which, under a VARIETY of PLAUSIBLE PRETENCES, may in time IMPERCEPTIBLY UNDERMINE this BEST PRESERVATIVE of English liberty.

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* This was written previous to the late Revolution in Sweden, accomplished perhaps by the *disuse* of the trial by jury, which deprived the people of their consequence, their spirit, and their power, in the scale of the Constitution.

“ The liberties of England cannot but subsist, so long as this *palladium* remains sacred and inviolate ; not only from all *open attacks* (which none will be so hardy as to make) but also from all *secret machinations*, which may sap and undermine it, by introducing new and arbitrary methods of trial ;—by Justices of the Peace, Commissioners of Revenue, and Courts of Conscience. [Why did he not mention the Court of King’s Bench ?] These inroads upon this sacred bulwark of the nation, are fundamentally opposite to the spirit of our Constitution ; and that, though *begun in trifles*, the *precedent* may *gradually increase* and *spread*, to the *utter disuse* of *juries* in *questions* of the *most momentous concern*.”

Those quotations, my Lord, will undoubtedly prove to the whole nation, the singular benefit which is derived from the trial by jury ; and that our freedom will no longer exist, than the forms and spirit of this trial is preserved in its utmost purity *.

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* But Sir William Blackstone explains all this on the subject of libels and informations *ex officio*, in contradiction of himself.

The next thing to be enquired into, is the pretended right of a Judge, to decide arbitrarily upon the law, in cases of libel. First, let us hear what two great men say on this subject. Lord Somers, in treating of the power of juries, observes, that "the Judges are *assistants* to them in explaining the *difficult points of the law*, in which it is presumed they should be learned. The *strength of every judgment* consists in the *verdict of these juries*, which the Judges do not give, but *pronounce or declare*: And the *same law* that makes good a *verdict* given *contrary to the advice or direction* of the Judges, *exposes them to the penalties*, if, upon *their own heads*, or a command from the King, they should *presume to give sentence without, or contrary to a verdict*; and NO PRETENSIONS to a POWER OF INTERPRETING the LAW can exempt them if they break it: Nay, even in SPECIAL VERDICTS, the Judges are only ASSISTANTS to the JURIES, who FIND it SPECIALLY, and the verdict is from THEM; though the Judges, having heard the point argued, DECLARE the sense of the law thereupon."

Thus, that great Lawyer, Lord Somers, being most pointedly against the destructive doctrine of libels, I shall quote another paragraph from Judge Blackstone: "Such public or open verdict may be either *general*, guilty, or not guilty; or *special*, setting forth all the circumstances of the case, and *praying* the *judgment* of the court, whether, for instance, on the facts stated, it be for murder, manslaughter, or no crime at all. *This is where they DOUBT the matter of law, and therefore CHUSE to leave it to the determination of the court*; though they have an *unquestionable right* of DETERMINING upon all the circumstances, and finding a *general verdict*, if they think proper so as to hazard a breach of their oaths; and, if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attain, at the suit of the King, but not of the prisoner. But the practice heretofore in use of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the Judge, was arbitrary, unconstitutional, and illegal; and

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is treated as such by Sir Thomas Smith, two hundred years ago, who "accounted such doings to be very violent, tyrannical, and contrary to the liberty and custom of the realm of England." For, as Sir Matthew Hale well observes, it would be a most *unhappy case* for the *Judge himself*, if the *prisoner's fate depended upon his directions*:—Unhappy also for the prisoner; for if the *Judge's OPINION must RULE the verdict*, the *trial by jury would be USELESS*.

In another place he says, "If judgments were to be the *private opinions* of the *Judge*, men would *then be slaves* to their *magistrates*."

Let me remind your Lordship, in addition to these authorities, of Junius's letter on this very great point. He says, "The *doctrine constantly delivered in cases of libel*, is another powerful evidence of a *settled plan to contract the legal power of juries*, and to *draw questions, inseparable from fact, within the arbitrium of the Court*. Here, my Lord, you have fortune on your side. When a Judge invades the province of a jury, in mat-
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ter of libel, he *in effect* attacks the liberty of the press. In some instances, he has succeeded, because jurymen are too often ignorant of their own rights, and too apt to be awed by the authority of a chief Justice. In other criminal prosecutions, the *malice* of the *design* is confessedly as much the *subject* of *consideration* to a jury, as the *certainty* of the *fact*. If a different doctrine prevail in the case of libels, why should it not extend to *all* criminal cases? Why not to capital offences? I see no reason, *why* the *life* of the *subject* should be *better protected* than his *liberty* or *property*. Why should a Judge enjoy the full power of pillory, fine and imprisonment, and not be indulged with hanging or transportation?"

"But, my Lord, (says Junius) since Judges have laboured, and not unsuccessfully, to destroy the *substance* of the trial, why should they suffer the *form* of the *verdict* to remain*? Why force twelve honest men, in *palpable violation* of their *oaths*, to *pronounce* their fellow-subject

* That amendment was left for Mr. Justice Buller to attempt, by *altering* the *record* of the *heart*.

subject a *guilty* man, when, almost at the same moment, they are *forbidden to enquire* into the *only circumstance* which, in the eye of law and reason, CONSTITUTES *guilt*—the *malignity or innocence of his intentions*? But, if Judges could succeed in making the trial by jury *useless and ridiculous*, they might then with greater safety, introduce a bill into Parliament, for enlarging the jurisdiction of the Court, and extending the trial by interrogatories to every question, in which the life or liberty of an Englishman is concerned."

All these quotations, my Lord, from great authorities, are most evidently against you. Sir William Blackstone, through the whole of his Commentaries, we see, dwells with rapture on the vast consequence attending the fair trial by jury. He speaks of it as the great bulwark of our liberties. He warns us to guard it against every encroachment and innovation. He affirms, that jurors have a right in all cases whatsoever, to decide upon the Law. He admonishes his fellow-subjects to pre-
serve

serve it as the palladium of their freedom. He proves, that no country ever lost their liberties, while this mode of trial was universally adopted in its purity and plenitude of power.

Then where is your power, my Lord, of depriving the jury of their right to decide on the law in cases of libel? Perhaps you will say, "These are but *opinions*, and is not *my* opinion greater than those?" Granted. Let us hear again, then, what Junius records of your Lordship's opinion on the power of juries deciding upon the law, in libels.—"If after all, *that the jury would take upon themselves to DETERMINE the LAW, THEY MIGHT DO IT.*" Is not this opinion *directly* contradictory?

According to Magna Carta, *judgments are to be passed by equals: And no man can be imprisoned, disseized of his freehold, deprived of his life or limb, unless by sentence of his Peers.* What statute then, can you adduce in support of your opinion? None. Common law is likewise against you

you, unless we except that of the Star-chamber, and the *attempts* of one or two former arbitrary Judges, who wanted to wrest this right from the people.

The doctrine then being extra-judicial and illegal, let all Judges beware of the fate of Trefilian and others, who suffered for their extravagant opinions. The High Court of Parliament adjudged them to be executed as traitors against the Sovereign Majesty of the People, and they suffered accordingly.

The Judges of the land swear faithfully, you know, to *serve* the *People* as well as the King, and to do *justice* to *every man*, according to the *law* of the *land*; and in *default* thereof, they are to *forfeit* their *bodies, lands, and goods*, as in cases of treason.

English Judges are only living pandects, to be consulted and referred to by the jurors in cases of difficulty. But they are by no means empowered to interfere as the Peers of the culprit. The King might as well

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interfere

interfere in the debates of his Parliament; for either interference would be equally illegal. Consequently, if any Judge pretends to an exclusive right of deciding upon the *law*, and the *intent* of the culprit, is not this assuming the privilege of the peer or equal, contrary to the spirit of the Constitution?

A bad Judge, like a bad Prince, will imitate the arbitrary class of his predecessors. There is great art in undermining the trial in matters of libel. It at once strikes at the very root of our liberty: For upon the freedom of the press stands the privileges of England. If the Judges, therefore, be allowed, my Lord, to decide upon the law in libellous cases, it will prove to be in time as effectual an *imprimatur*, as ever was in this country previous to the Revolution. Prevent only the people from communicating their free and unbiassed sentiments in print to one another, and arbitrary Monarchy, Aristocracy, or Democracy, again rear their heads. The freedom of debate, and the liberty of speech, will soon follow, Juries will be-
come

come the mere instruments of the Judges ;
and then, where is freedom ?

Since every trivial sentence may be found a libel, if your opinion were adopted, it would be an action worthy to immortalize even all the individuals in both Houses of Parliament, to review, check, and ascertain by statute, the authority of the Judges in all possible constitutional cases whatsoever. Such an act would regulate and confirm the people in their undoubted, though disputed rights ; and were even that to happen, it is a melancholy reflection, that an arbitrary Judge would have still sufficient power left in the dogmatical practice of his court, to exercise his tyranny on trivial occasions, owing to the perplexity of our common law ; though but without being able materially to injure the liberties of the subject : For is it not the height of absurdity and injustice, that a Parliament shall enact laws, which neither the King nor the People dare break, but which a Judge may set aside, or act diametrically opposite to the spirit of the constitutional law with impunity ?

Retract, therefore, my Lord, your opinion respecting the power of Judges in libellous cases. Even age can never look more amiable than in amending its errors. As it is almost the only speck that dims the lustre of your admired talents, wipe it off in time, my Lord, and you shall go down to the grave in all the dazzling splendor that shines upon superior talents, when possessed by a man so renowned for justice and integrity as your Lordship.

Agree on this subject with your learned and most worthy brother, Willes, and avoid the maxims of a ———; who, owing to his temerity and your Lordship's timidity, has made a far greater encroachment on the power of juries, than ever you have done. He is labouring, perhaps, to be appointed as your successor, my Lord; and his enterprising mind well merits it. His talents may be traced from D——— to Dean Shipley. If the laurel proved fatal to the Captain's neck, it then first flourished on the Judge's brow. And should you, therefore, not recede from your doctrine of libels, there is not a more able successor to be found even
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in the Inquisitorial Court of Portugal, than the undaunted —.

But, my Lord, if you possess the ambition to have your name handed down to future ages as an immaculate Judge, which except in this one instance you undoubtedly are, adopt the constitutional doctrine of your juvenile countryman, Mr. Erskine. If you do not, your precedent, it is to be hoped, will die with you; and the people of England will impartially pay your country this just compliment; that if their liberties were attempted to be overturned by one set of men, they were nobly and vigorously supported by another.

I am, my LORD,

With the greatest Respect,

Your most humble servant,

A Country Gentleman.

in the Japanese Court of Inquiry, than
the undoubted —

But, my Lord, if you believe the
fact to have been as stated, then to
believe that the Japanese Court of Inquiry
except in this one instance, was not
able to detect the commission of such
a crime, seems to me to be a
very great mistake. It is to be
remembered that the Japanese Court of
Inquiry was not a mere body of
judges, but a body of men who were
well acquainted with the facts of the
case, and who were not likely to be
deceived by the statements of the
defendant.

It is also to be remembered that
the Japanese Court of Inquiry was
not a mere body of judges, but a
body of men who were well acquainted
with the facts of the case, and who
were not likely to be deceived by the
statements of the defendant.

Your Lordship's Lordship
is, I believe, a very learned
man, and I am sure that you will
be able to detect the commission of
such a crime.

Very truly
yours,
[Signature]

[31]

APPENDIX.

THE question which led lately to Lord Mansfield's confirmation of his former opinion, respecting Juries not having power to decide on the law, in cases of libel, was occasioned by the Dean of St. Asaph's trial: And as the dialogue in the pamphlet attempted to be proved libellous has made some noise, it is here subjoined with remarks for the gratification of the Reader.

The PRINCIPLES of GOVERNMENT, in a Dialogue between a GENTLEMAN and a FARMER.

F. Why should humble men like me, sign or set marks to petitions of this nature? It is better for us farmers to mind our husbandry, and leave what we cannot comprehend to the King and Parliament.

G. You can comprehend more than you imagine; and, as a free member of a free state,

32 A P P E N D I X.

state, have higher things to mind than you may conceive.

F. If by free you mean out of prison, I hope to continue so, as long as I can pay my rent to the 'squire's bailiff; but what is meant by a free state?

G. Tell me first what is meant by a club in the village, of which I know you to be a member.

F. It is an assembly of men, who meet after work every Saturday to be merry and happy for a few hours in the week.

G. Have you no other object but mirth?

F. Yes; we have a box, into which we contribute equally from our monthly or weekly savings, and out of which any members of the club are to be relieved in sickness or poverty; for the parish officers are so cruel and insolent, that it were better to starve than apply to them for relief.

G. Did they, or the 'squire, or the parson, or all together, compel you to form this society?

F. Oh! no; we could not be compelled; we formed it by our choice.

G. You

G. You did right. But have you not some head or president of your club?

F. The master for each night is chosen by all the company present the week before.

G. Does he make laws to bind you in case of ill temper or misbehaviour?

F. He make laws! He bind us! No; we have all agreed to a set of equal rules, which are signed by every new comer, and were written in a strange hand by young Spelman, the lawyer's clerk, whose uncle is a member.

G. What should you do, if any member were to insist on becoming perpetual master, and on altering your rules at his arbitrary will and pleasure?

F. We should expel him.

G. What, if he were to bring a serjeant's guard, when the militia are quartered in your neighbourhood, and insist upon your obeying him?

F. We would resist, if we could; if not, the society would be broken up.

G. Suppose that, with his serjeant's guard,

F

he

he were to take the money out of the box, or out of your pockets ?

F. Would not that be a robbery ?

G. I am seeking information from you. How should you act upon such an occasion ?

F. We should submit, perhaps, for that time ; but should afterwards try to apprehend the robbers.

G. What if you could not apprehend them ?

F. We might kill them, I should think ; and if the King would not pardon us, God would.

G. How could you either apprehend them, or, if they resisted, kill them, without a sufficient force in your own hands ?

F. Oh ! we are all good players at fingle-stick ; and each of us has a stout cudgel or quarter-staff in the corner of his room.

G. Suppose that a few of the club were to domineer over the rest, and insist upon making laws for them ?

F. We must take the same course ; except it would be easier to restrain one man,
than

than a number; but we should be the majority with justice on our side.

G. A word or two on another head. Some of you, I presume, are no great accountants?

F. Few of us understand accounts; but we trust old Lilly, the school-master, whom we believe to be an honest man; and he keeps the key of our box.

G. If your money should, in time, amount to a large sum, it might not, perhaps, be safe to keep it at his house, or in any private house.

F. Where else should we keep it?

G. You might chuse to put it into the funds, or to lend it the 'squire, who has lost so much lately at Newmarket, taking his bond on some of his fields, as your security for payment, with interest.

F. We must, in that case, confide in young Spelman, who will soon set up for himself; and if a lawyer can be honest, will be an honest lawyer.

G. What power do you give to Lilly, or should you give to Spelman, in the case supposed?

F 2

F. No

F. No power ; we should give them both a due allowance for their trouble, and should expect a faithful account of all they had done for us.

G. Honest men may change their nature. What if both, or either of them, were to deceive you ?

F. We should remove them, put our trust in better men, and try to repair our loss.

G. Did it never occur to you, that every state or nation was only a great club ?

F. Nothing ever occurred to me on the subject ; for I never thought about it.

G. Though you never thought before on the subject, yet you may be able to tell me, why you suppose men to have assembled, and to have formed nations, communities, or states, which all mean the same thing ?

F. In order, I should imagine, to be as happy as they can, while they live.

G. By happy, do you mean merry only ?

F. To be as merry as they can, without hunting themselves or their neighbours ; but chiefly to secure themselves from danger, and to relieve their wants.

G. Do

G. Do you believe that any King or Emperor compelled them so to associate?

F. How could one man compel a multitude? A King or an Emperor, I presume, is not born with a hundred hands.

G. When a Prince of the blood shall, in any country, be so distinguished by nature, I shall then, and then only, conceive him to be a greater man than you: But might not an army, with a King or General at their head, have compelled them to assemble?

F. Yes; but the army must have been formed by their own choice; one man of a few can never govern many, without their consent.

G. Suppose, however, that a multitude of men, assembled in a town or city, were to chuse a King or Governor; might they not give him high power and authority?

F. To be sure; but they would never be so mad, I hope, as to give him a power of making their laws.

G. Who else should make them?

F. The whole nation or people.

G. What if they disagreed?

F. The opinion of the greater number,

as in our village clubs, must be taken, and prevail.

G. What could be done, if the society were so large, that all could not meet in the same place?

F. A greater number must chuse a less.

G. Who should be chusers?

F. All who are not upon the parish in our club. If a man asks relief of the overseer, he ceases to be one of us, because he must depend upon the overseer.

G. Could not a few men, one in seven, for instance, chuse the assembly of law-makers, as well as a larger number?

F. As conveniently, perhaps; but I would not suffer any man to chuse another, who was to make laws, by which my money, or my life, might be taken from me.

G. Have you a freehold in any county of forty shillings a-year?

F. I have nothing in the world but my cattle, implements of husbandry, and household goods, together with my farm, for which I pay a fixed rent to the 'squire.

G. Have

G. Have you a vote in any city or borough?

F. I have no vote at all; but am able, by my honest labour, to support my wife and four children, and, whilst I act honestly, I may defy the laws.

G. Can you be ignorant, that the Parliament to which members are sent by this country, and by the next market town, have power to make new laws, by which you and your family may be stripped of your goods, thrown into prison and even deprived of life?

F. A dreadful power! I never made enquiries, having business of my own, concerning the business of Parliament; but imagined the laws had been fixed for many hundred years.

G. The common laws to which you refer, are equal, just, and humane; but the King and Parliament may alter them when they please.

F. The King ought therefore to be a good man, and the Parliament to consist of men equally good.

G. The King alone can do no harm, but who must judge the goodness of Parliament men?

who

F. All those whose property, freedom and lives may be affected by their laws.

G. Yet six men in seven who inhabit this kingdom, have, like you, no votes ; and the petition which I desired you to sign, has nothing for its object but the restoration of you all, to the right of chusing those law-makers, by whom your money or your lives may be taken from you : attend while I read it distinctly.

F. Give me your pen. I never wrote my name, ill as it may be written, with greater eagerness.

G. I applaud you ; and trust that your example will be followed by millions. Another word before we part. Recollect your opinion about your club in the village, and tell me what ought to be the consequence, if the King alone were to insist on making laws, or on altering them at his will and pleasure.

F. He too must be expelled.

G. Oh ! but think of his standing army, and of the militia, which now are his in substance, though ours in form.

F. If

F. If he were to employ that force against the nation, they would, and ought to resist him, or the state would cease to be a state.

G. What if the great Accountants, and great Lawyers, the Lillys and Spelmans of the nation, were to abuse their trust, and cruelly injure, instead of faithfully serving the public ?

F. We must request the King to remove them, and make trial of others ; but none should implicitly be trusted.

G. But what if a few great Lords or wealthy men were to keep the King himself in subjection, yet exert his force, lavish his treasure, and misuse his name, so as to domineer over the people, and manage the Parliament ?

F. We must fight for the King and ourselves.

G. You talk of fighting, as if you were speaking of some rustic engagement at a wake, but your quarter-staffs would avail you little against bayonets.

F. We might easily provide ourselves with better arms.

G

G. Not

G. Not so easily; when the moment of resistance came, you would be deprived of all arms; and those who should furnish you with them, or exhort you to take them up, would be called traitors, and probably put to death.

F. We ought always, therefore, to be ready; and keep each of us a strong firelock in the corner of his bed-room.

G. That would be legal as well as rational. Are you, my honest friend, provided with a musket?

F. I will contribute no more to the club, and purchase a firelock with my savings.

G. It is not necessary. I have two, and will make you a present of one, with complete accoutrements.

F. I accept it thankfully; and will converse with you at your leisure on other subjects of this kind.

G. In the meanwhile, spend an hour every morning in the next fortnight, in learning to prime and load expeditiously, and to fire and charge with bayonet firmly and regularly. I say every morning, because, if you exercise too late in the evening, you may fall into some of the legal snares, which
have

A P P E N D I X. 4

have been spread for you by those gentlemen, who would rather secure game for their table, than liberty for the nation.

F. Some of my neighbours, who have served in the militia, will readily teach me; and perhaps the whole village may be persuaded to procure arms, and learn their exercise.

G. It cannot be expected, that the villagers should purchase arms; but they might easily be supplied, if the gentry of the nation would spare a little from their vices and luxury.

F. May they turn to some sense of honour and virtue!

G. Farewell, at present; and remember,
“ That a free state is only a more numerous
“ and more powerful club, and that he only
“ is a free man, who is a member of such a
“ state.”

F. Good morning, Sir, you have made me wiser and better than I was yesterday; and yet, methinks, I had some knowledge in my own mind of this great subject, and have been a politician all my life without perceiving it.

G.

REMARKS

R E M A R K S
ON THE
PRECEDING DIALOGUE,
AND THE CASE OF THE
DEAN OF SAINT ASAPH.
BY M. DAWES, Esq.

WHEN Mr. ERSKINE moved the Court for a new trial, on the ground of misdirection to the Jury, at Shrewsbury, whereby they were left to themselves on the subject of the defendant's intentions, in publishing the preceding Dialogue, the ingenious and just manner in which he exposed the sophistry of Mr. Bearcroft, and Mr. Justice Buller's arguments, so alarmed Lord Mansfield, and appeared so powerfully to shake the doctrine long laid down by his Lordship, that he regretted

regretted much a motion had not rather been made in the beginning, to arrest the judgment. It is therefore due to him to say, that in this particular his art, though contrary to the maxim of *ars est celare artem*, has favored his opponent, who, in spite of his wishes, held up his own tenets as absurd, and forced from Mr. Justice Willes and Mr. Bearcroft, a declaration, which implied every thing in direct contradiction to the prevailing doctrine of libels. By admitting that a Jury have a right to find a general verdict, they admit them, to all intents and purposes, to be judges of guilt, or no guilt, according to the charge of which a man is indicted, and which, if not made out in evidence, must with them, and them only, fall to the ground.

Yet, as nothing has been said on the criminality of the Dialogue, tho' judgment was properly arrested, because the indictment stated no averments from the inuendos, or otherwise, it may be proper, in this place, to consider its nature and tendency, in opposition to the prosecutors of the Reverend Dean,

Dean, and all their coadjutors, who have marked him out for vengeance in vain.

The question of libel or no libel, or indeed the criminality of any paper, taken up as the former, being assumedly in the criminal court, though justly in the Jury, let us see then how far the Dialogue between a Gentleman and a Farmer is obnoxious to censure. The mere defect of the indictment on which the Dean of St. Asaph was arraigned and tried, having entitled him to an acquittal, the question of crime or no crime, as to the dialogue set out in it, never came before the court. And very fortunately for Lord Mansfield, who, in every other case between man and man, is celebrated for dispensing the most equitable justice, that very doctrine he seems peculiarly fond of, was reserved to be destroyed, until some future occasion shall again call forth the honest exertions of Mr. Erskine, to rescue a supposed libeller from the *fangs* of the law's exclusive consideration on his guilt, after a Jury have found the innocent fact of printing, or publishing, on the

the trial of the indictment, which, in point of inuendo and averment, may be every way compleat and pleader like.

It was argued by Mr. Berarcroft and Mr. Buller, in order to blind the Jury's eyesight into the true distinction, that because they had no right to judge of the operation of a fine, in a civil cause of ejectment, nor to determine murder or no murder, in a criminal one, they had nothing to do with the criminality of any paper, for the writing or publishing whereof, a man was prosecuted as a libeller. This mode of reasoning involves a contradiction. In an ejectment, if the operation of a fine make against a plaintiff's lessor, and favour a defendant, the Judge explains the law to the Jury, who find for such defendant, because they find he committed no trespass by his ouster, though confessed by the common rule of court, so as to bring on the question of title only. Here it must be born in mind, that the Jury consider law and fact. The law is not left for the court to judge exclusively of, as it arrogantly does in the case
of

a libel. The Jury, by finding for the plaintiff, or the defendant, include it in their verdict. And as to the other pretence, that they have nothing to do with the question of murder or no murder, no Crown Lawyer will be hardy enough to say, in his closet, whatever he may say in court, that if they find a man guilty of it, they do not join law and fact together, or that when the law is fully explained to them, they do not apply it to the fact proved, and find accordingly.

Away then with such arguments as these are, which have, nevertheless, from their perplexity, long dazzled the comprehension of Juries, who have been awed and hoodwinked into the directions of Judges, on trials for public libels; and who, from a want of a just sense of their duty, and of that false doctrine which has been imposed on them as orthodox, have been finally, though ignorantly induced to substitute guilt for innocence.

No contradiction can be greater than Mr. Bearcroft of himself, when after quoting
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the instance, that a Jury have nought to do with the operation of a fine, or the question of murder or no murder, he admitted they had a right to find a general verdict. By the former, it is very plain they join law and fact together, when the law is explained to them, and by the latter, they judge of that criminality, which he said at Shrewsbury they had nothing to do with.

Having then seen that law and fact are inseparable in all cases, and that Juries, of right, determine on both, when connected together to constitute an offence or crime, the view of the simple Dialogue that Mr. Jones, the Attorney, thought fit, under the influence of some over-ruling power, to attack as a libel, will be enough to convince us that the criminal court must have deemed it harmless, either on a demurrer, or an arrest of judgment, before or after trial.

But supposing, by the way, that in every prosecution for a libel, the writing, or publishing, were unquestionable, and the sense

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of the court were to be taken on the criminality of either by demurrer (which would, as things now go, save much time, trouble, and expence, as the rule of law at present stands constructed by the Judges, unestablished on the noble basis of the common law, *lex terræ*, or statute law) a man has nothing to depend on but their discretion, and the partial use of the jargon of inuendos, averments, and intendments for his acquittal. If these can possibly be warped, as was the case, in a degree, with Mr. Horne, and, no doubt, many others, any paper, the contents whereof arraign the conduct of a Minister, or speak of and concerning the King and his government, may, or may not be deemed criminal, as the Judges please. They have no legal criterion, whereby the innocence or criminality of our discussions is discoverable. Their provocation and tendency to break the peace, are all that constitute their guilt. Now, granting readily that a rebellion actually begun, may produce a revolution, in which it is lost and forgotten, and that consequently it is the duty of the existing government

vernment to prevent it, none but the overtimid and apprehensive can ever say, that a paper written with moderation, temper, and positive or speculative truth, can produce it. It may be otherwise with inflammatory falsehoods, which ought to be punished, falsehood being a crime in itself, which, from its aggravation, and being disseminated among the people, has a real tendency to break the peace, if not to raise rebellion. This falsehood, however, is not to be implied, created by inuendo, or raised by averment or intendment, contrary to the maxim of Beau-pleader, which Lord Coke calls the heart-string of the law. It must appear in the indictment, and be proved to the Jury, who are the proper, the natural judges of the intent of a defendant, drawn from facts, or he ought to be acquitted. If, for example, he own to them the writing or publishing, and that he will write or publish the like again, the criminality of that writing will determine his intention to be criminal, of which they have the right to judge.

The Jury who tried the Dean of St. Asaph, at Shrewsbury, found the fact of publishing only, though in a parley with the Judge, they found also the inuendos, but nothing about a libel, consequently they confounded the distinction, in the case of Woodfall, on which Lord Mansfield said, that a verdict of publishing only, negatived the inuendos. To find, therefore, the inuendos and publishing only, is certainly not to negative the former, but to find, from their admission after they considered them, that there was no guilt in the defendant, and to acquit him. This the court determined, on the motion in arrest of judgment, by saying that the indictment was insufficient, because nothing was averred in it expressly, or by intendment of law. The Jury could not determine on the averments, because the indictment did not contain any, and this is a particular that seems to have escaped all the writers on the subject, who are not of the profession of the law. Hence, after all the *eclat* that has been made about the Dean of St. Asaph, the question whether the Dialogue he published were criminal,

as a libel, or not, has never been agitated, except by Mr. Bearcroft, when addressing the Jury on the trial, and endeavouring to obtain their general verdict in favour of his client.

As it is said, in the advertisement prefixed to this offensive Dialogue, " That the friends of the Revolution will instantly see that it contains no principle which has not the support of the highest authority, as well as the clearest reason, so it may be said in addition, that nothing but downright party hatred, and libellous malice, could have set on foot a criminal prosecution against the Dean for publishing it ; a prosecution, which the prosecutor's counsel deemed imprudent. And although in the same breath he gave his opinion, that the Dialogue was a libel, and *meant* to reflect on the King and his government, as well as to excite sedition and discontent among the people, almost the contrary is the truth, and of course, the Dialogue is no libel at all. A writing may reflect on the King and his government, and be very true, innocent, constitutional,

stitutional, and well meant. If it be as simple as the Dialogue, and as consonant with the Revolution principles of a Somers and a Locke, it can never be a libel, even though a King's counsel, in defence of a government which may openly violate them, should presume to declare his opinion to the contrary.

The whole crime alledged in this Dialogue is, that it advises the people to take up arms, and learn the Prussian exercise; but this is not true. The question to the Farmer is—What if a few great Lords, or wealthy men, were to keep the King himself in subjection; yet exert his force, lavish his treasure, and misuse his name, so as to domineer over the people, and manage the Parliament?—To which he replies—We must fight for the King and ourselves—and an honest patriotic answer it is. It is of and concerning the King and his government, which ought to be supported against such Lords or wealthy men, who may strive to keep him in subjection, and abuse his people; and the means he points out in a
subsequent

subsequent answer, are constitutional. This Mr. Bearcroft said, in one sense, though in another he applied it as libellous.

Such contradictions, such warpings, such jargon and confusion, which such legal sophists are guilty of, may well embarrass a Jury of honest, well-intentioned men, and deprive them of their right. But when truth is separated and disentangled from them it must appear, 1st. That the Dialogue in question is no libel. 2d, That a Jury have a right to judge of libel or no libel. And lastly, that it only requires a knowledge of the subject itself, independent of Star Chamber prejudices, to say a libel is indefinable, and that nothing *tending* to a breach of the peace is criminal, but what is either CRIMINAL IN ITSELF, or *malum prohibitum*.

In short, so vague, indefinite and arbitrary is the whole doctrine of libels, as drawn from the slavish principles of the civil law, that its defenders are involved in the grossest contradictions and prevarications in spite of themselves, and every effort to avoid it.

Yet

Yet, Heaven be praised, it is now become so well understood, and its deceit shines so glaringly out of the veil that has so artfully been spread over it, that another Dialogue, and another prosecution, like a late one, will in all probability so severely hamper the criminal Judges, in their own sophistry, as either to compel them to leave Juries to judge of law and fact, in matters of libel, as in all other, agreeably to their right so to do, or that the business will be taken up by Parliament, for the honour of God and conscience, truth and common reason; otherwise the constrained surrender of English liberty, in this one instance, may lead to the surrender of many more, until in the end there may be none to surrender. It is a subject of importance; and the protection of one liberty may, by the same rule, lead to the protection of every other, which make the English character throughout the world unrivalled.



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